Supreme Court, U.S.
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No. 05-1450

In The
Supreme Court of the United States

V. STEPHEN MOORE, and others similarly situated,

Petitioners,

vs.

ACCENTURE, LLP, ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, and ACCENTURE UNITED STATES OPTIONAL LIFE INSURANCE PLAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the United States District Court for the Northern District, Atlanta Division, entering a voluntary dismissal of this class action ERISA complaint by V. Stephen Moore (hereinafter "Plaintiff Moore"), despite the failure of the district court to notify the potential class members prior to the dismissal. This appeal challenges the district court's authority to dismiss the class action plaintiffs without notice to the class and whether this gives adequate protection to the rights of the class under Federal Rule of Civil Procedure 23(e)(1). The 2003 Amendment to Federal Rule of Civil Procedure 23 appears to suggest that class action plaintiffs require more notice than they received through the court's entry of the dismissal. The committee notes to the 2003 Amendment to Rule 23(e)(1) state that "Notice of a settlement binding on the class is required either when the settlement follows class certification *or when the decisions on certification and settlement proceed simultaneously.*" Fed. R. Civ. P. 23 (Committee Note, 2003 Amendments) (emphasis added). The Sixth Circuit is the only Circuit Court to have issued a decision since Rule 23(e) was amended in 2003. The district court's decision conflicts with the holdings of the Sixth Circuit.

Defendant Accenture, LLP/Andersen and its various employment plans (hereinafter "Accenture/Andersen") does not dispute that it had already granted the entire class the relief sought, except the requested attorneys' fees. This information was transmitted to Plaintiff Moore on December 9, 2004, the day after the attempted dismissal. Even though Accenture/Andersen says it granted

QUESTIONS PRESENTED – Continued

full relief, except attorneys' fees to the entire class, all Plaintiff Moore ever knew, and all that was ever presented to the court, was that Plaintiff Moore was granted the relief that he sought. The court made no determination as to whether the class did in fact receive the relief stated by Accenture/Andersen, or whether it was adequately protected.

On December 9, 2004, Accenture/Andersen notified Plaintiff Moore that it had reversed its position on the disability leave policy and no longer intended to terminate him, effective January 1, 2005, and allegedly notified all other similarly-situated employees of the same thing. On December 21, 2004, the class plaintiffs filed and served a second complaint, case no. 1:04-cv-03717-TWT (hereinafter "Moore II"). The purpose of the Moore II complaint was to seek the attorneys' fees previously granted to the class, as admitted by Accenture/Andersen. The second complaint should be considered an amended complaint, or, at a minimum, the second complaint related back to the first complaint as a renewal action. Contemporaneously with the filing of the Moore II complaint, the class plaintiffs filed a Motion for Attorneys' Fees. That motion was denied on May 6, 2005 on the bases that it was moot and for lack of standing. However, that holding was erroneous because Moore I was voluntarily dismissed by only Moore, not the putative class. Moreover, Plaintiff Moore's dismissal in Moore I was presented as a motion to dismiss so that the class action plaintiffs could receive adequate notice and a chance to respond before a decision was entered by the court.

QUESTIONS PRESENTED – Continued

Out of an abundance of caution, on January 4, 2005, the class plaintiffs in Moore I also filed a Special Motion for Fees and Costs and Motion for Limited Discovery with Brief in Support. Judge Thomas W. Thrash issued an Order on September 16, 2005, denying Plaintiffs' Motion for Attorney Fees, Motion for Costs, and Motion for Discovery. Unfortunately, Judge Thrash has made a clearly erroneous ruling because the case has never been properly dismissed and because he failed to analyze the dismissal under ERISA.

Under Eleventh Circuit precedent, the district court was required to conduct a five part test to determine whether attorneys' fees are appropriate to the prevailing party under ERISA. However, the Eighth Circuit requires no analysis and has determined that the prevailing party, absent special circumstances, is automatically entitled to attorneys' fees. Thus, there is a split in the circuits concerning how the ERISA request for fees should have been addressed.

In response to Judge Thrash's final Order, the class plaintiffs filed a Notice of Appeal on September 27, 2005.

The three questions presented are as follows:

1. How does the 2003 amendment to Rule 23(e)(1) affect a district court's obligation to notify potential class members prior to the dismissal of a class action complaint: Is the district court required, at a minimum, to review and decide whether notice to the putative class members is required, and that the rights of the class have been adequately protected?

QUESTIONS PRESENTED – Continued

2. Whether the class plaintiffs are entitled to the prior attorneys' fees award, notwithstanding the district court's subsequent dismissal.

3. Whether the prevailing party in an ERISA case is entitled to an attorneys' fees award even if this court holds that Rule 23(e)(1) did not require the district court to give notice to the class prior to dismissal. There is currently a split in the circuits in which the eighth circuit mandates that the prevailing party in an ERISA case is entitled to attorneys' fees, while the remaining circuits hold that the award of attorneys' fees to the prevailing party is subject to a discretionary analysis.

LIST OF PARTIES

Petitioners are V. Stephen Moore, class representative, and others similarly situated.

Respondents are Accenture, LLP, formerly Andersen Consulting, LLP, Accenture United States Basic Life/ Accidental Death & Dismemberment Insurance Plan, Accenture United States Group Dental Plan, Accenture United States Group Medical Plan, Accenture United States Optional Accidental Death & Dismemberment Insurance Plan, and Accenture United States Optional Life Insurance Plan.

CORPORATE DISCLOSURE STATEMENT

Defendant Accenture, LLP, formally Andersen Consulting, LLP and once a part of the now failed Arthur Andersen, LLP, is an Illinois limited liability partnership.

Defendant Accenture United States Group Medical Plan (hereinafter "Medical Plan") is an employer-sponsored welfare benefit plan.

Defendant Accenture United States Group Dental Plan (hereinafter "Dental Plan") is an employer-sponsored welfare benefit plan.

Defendants Accenture United States Basic Life/ Accidental Death & Dismemberment Insurance Plan, Accenture United States Optional Life Insurance Plan, and Accenture United States Optional Accidental Death & Dismemberment Insurance Plan (hereinafter "Life Insurance Plans") are employer-sponsored welfare benefit plans.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	v
CORPORATE DISCLOSURE STATEMENT	v
TABLE OF CONTENTS	vi
TABLE OF AUTHORITIES	viii
TABLE OF APPENDICES	x
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR ALLOWANCE OF THE WRIT	7
I. THE 2003 AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 23(E)(1) HAS CAUSED A SPLIT IN THE CIRCUITS REGARDING A COURT'S OBLIGATION TO NOTIFY POTENTIAL CLASS MEMBERS PRIOR TO THE DISMISSAL OF A CLASS ACTION COMPLAINT PARTICULARLY BECAUSE THE RIGHTS OF THE CLASS MAY BE ADVERSELY AFFECTED BY THE DISMISSAL	7
II. THE COURT ERRED IN DENYING THE PLAINTIFFS' ATTORNEYS' FEES BECAUSE THE RELIEF WAS SUPPOSEDLY OBTAINED BY THE CLASS AFTER THE DISMISSAL	9

TABLE OF CONTENTS – Continued

Page

III. THE PREVAILING PARTY IN AN ERISA CASE IS ENTITLED TO THE GRANTING OF ATTORNEYS' FEES EVEN IF THIS COURT HOLDS THAT RULE 23(E)(1) DID NOT REQUIRE THE DISTRICT COURT TO GIVE NOTICE TO THE CLASS PRIOR TO DISMISSAL. THERE IS CURRENTLY A SPLIT IN THE CIRCUITS IN WHICH THE EIGHTH CIRCUIT MANDATES THAT THE PREVAILING PARTY IN AN ERISA CASE IS ENTITLED TO ATTORNEYS' FEES, WHILE THE REMAINING CIRCUITS HOLD THAT THE AWARD OF ATTORNEYS' FEES TO THE PREVAILING PARTY IS SUBJECT TO A DISCRETIONARY ANALYSIS 12

CONCLUSION 17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

UNITED STATES SUPREME COURT

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) 13

Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968) 12

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Dunn v. The Florida Bar, 889 F.2d 1010 (11th Cir. 1989) 13

Fields v. City of Tarpon Springs, Florida, 721 F.2d 318 (11th Cir. 1983) 11

Williams v. City of Fairburn, 702 F.2d 973 (11th Cir. 1983) 10, 11

OTHER UNITED STATES COURTS OF APPEALS

Doe v. Lexington-Fayette County Gov't, 407 F.3d 755 (6th Cir. 2005) 7, 8

Hummell v. S.E. Rycoff & Co., 634 F.2d 446 (9th Cir. 1980) 14

Iranian Student's Association v. Edwards, 604 F.2d 352 (5th Cir. 1979) 10, 13, 14

Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980) 12

Smith v. CMTA-IAM Pension Trust, 746 F.2d 587 (9th Cir. 1984) 13

Watkins v. Mobile Housing Board, 32 F.2d 565 (5th Cir. 1980) 10

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES DISTRICT COURTS

Aikens v. Deluxe Fin. Serv., Inc., Civ. Action No. 01-2427-CM, 2005 WL 1041351 (D. Kan. March 2, 2005) 7

Daniels v. Bursey, Case No. 03 C 1550, 2006 WL 468015 (N.D. Ill. October 19, 2004) 7

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. §§ 1132(a)(1), *et seq.* 3

29 U.S.C. § 1132(g)(1) 1, 12

29 U.S.C. § 1140 3

FEDERAL RULES

Fed. R. Civ. P. 23(e)(1) ..... *passim*

Fed. R. Civ. P. 41(a)(1) 1, 10

TABLE OF APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the Eleventh Circuit. Dated and Decided February 10, 2006.....App. 1

Appendix B – Plaintiff Moore's Notice of Voluntary Dismissal .....App. 3

Appendix C – Clerk's Entry of Dismissal.....App. 5

Appendix D – Order Denying Motion for Attorneys' Fees, Motion for Costs, Motion for Discovery.....App. 7

OPINION BELOW

The opinion of the court of appeals (05-15375-E) is unreported. However, the opinion is included herewith as Appendix A.

STATEMENT OF JURISDICTION

The Judgment of the court of appeals was entered on February 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Rules of Civil Procedure, including Rule 23(e)(1) and Rule 41(a)(1), and relevant provisions of ERISA, including 29 U.S.C. § 1132(g)(1).

STATEMENT OF THE CASE

Petitioners/Plaintiffs (hereinafter "class plaintiffs," when referring to the entire class, or "Plaintiff Moore," when referring to class representative V. Stephen Moore) filed an ERISA class action complaint on October 25, 2004 (hereinafter "Moore I"). Plaintiff Moore worked for Andersen Consulting, LLP, which later became Accenture, LLP (hereinafter "Accenture/Andersen," or "the Company"), in Atlanta from August, 1987 until he became disabled on October 15, 1992. When Andersen Consulting split from Arthur Andersen, LLP, it was legally obligated to distinguish itself; therefore, it was renamed Accenture, LLP.

Pursuant to his employment with Accenture/Andersen, Plaintiff Moore had been a participant in the various disability plans that were sponsored by the Company and/or their predecessors since 1987 (hereinafter "the Plans"). In 1992, Plaintiff Moore notified Accenture/Andersen that he suffered from a disabling medical condition. In response, Accenture/Andersen placed Plaintiff Moore in an unpaid leave of absence status beginning on October 15, 1992, which allowed Plaintiff Moore to continue participating in and receiving benefits from the Plans by paying the employee portion of the premiums. The other class members, other disabled employees, were similarly allowed to continue participating in and receiving benefits from the Plans by paying the employee portion of the premiums. Accenture/Andersen assured Plaintiff Moore that he would remain eligible to participate in the Plans for as long as his disability lasted. Plaintiff Moore was then, and remains, an active paid participant in the Plans. The underlying litigation was not about the failure to pay disability benefits, but rather interference with and discontinuation of other benefits.

Nevertheless, Accenture/Andersen notified the class plaintiffs of a change in its policies in 2002 by sending out a memorandum dated December 18, 2002, titled "U.S. Accenture People currently on Long-Term Disability Leave of Absence." Through this memorandum, Accenture/Andersen informed the class members, who were already on disability leave, of a change in leave policy. Accenture/Andersen informed Plaintiff Moore that changes to its policies and to the Plans would result in termination of his employment on January 1, 2005, and thus in the loss of his eligibility for health, dental and life insurance benefits through the Plans. Accenture/Andersen

made this change to its disability leave policy, despite the assurances made to its employees already on disability leave and in violation of the Plans' fiduciary duties to their beneficiaries. In addition, Accenture/Andersen failed to include any "grandfather" clause, so that people like Plaintiff Moore, who had been on leave for years, who were over forty, and who would most likely not qualify for any reasonably priced health, dental nor life insurance, would not suffer catastrophic health care costs and other losses as a result of the Company's actions with respect to the Plans.

Plaintiff Moore filed his complaint on behalf of himself and others similarly situated (a class action) in the Northern District of Georgia for violations of 29 U.S.C. §§ 1132(a)(1), *et seq.* and 1140, against Accenture/Andersen and its various employee benefit plans: Accenture United States Basic Life/Accidental Death & Dismemberment Insurance Plan, Accenture United States Group Dental Plan, Accenture United States Group Medical Plan, Accenture United States Optional Accidental Death & Dismemberment Insurance Plan, and Accenture United States Optional Life Insurance Plan. Prior to the now infamous Enron related dissolution of Arthur Andersen, LLP, Andersen spun off its consulting branch, which was renamed Accenture, LLP. Plaintiff Moore's employment was transferred with the spinoff to Accenture. Plaintiff Moore attempted to voluntarily dismiss his Complaint, and his Complaint only, on December 8, 2004.

The dismissal did not state that the entire class was being dismissed. Instead, it was presented as a motion to dismiss, intending to preserve the rights of the other claimants and provide them with an opportunity to respond and the district court an opportunity to dismiss

Moore, individually. The clerk, however, then erroneously dismissed the claim against the entire class pursuant to Rule 41(a). Moreover, before Plaintiff Moore filed his Motion to Dismiss, Accenture/Andersen had already granted the entire class the relief sought, except the requested attorneys' fees. This information was transmitted to Plaintiff Moore and, according to Defendant to the other class plaintiffs, the day after the attempted dismissal, December 9, 2004. However, without a proper analysis from the court, there is no way to tell whether the class did indeed receive this relief.

Federal Rule of Civil Procedure 23(e)(1) was amended in 2003 and states:

> (1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.
>
> (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
>
> (C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.
>
> (2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.
>
> (3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse

> to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).
>
> (B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

The amendment to the Rule has caused a somewhat unclear standard concerning the voluntary dismissal of class actions by the class representative. The committee notes state that notice of a settlement requires the court to notify the individual members of the class under these circumstances. Thus, those committee notes appear to make the dismissal in this case invalid. In fact, the only circuit court that has issued a decision on this topic since the 2003 amendment is the Sixth Circuit. The Sixth Circuit's decision should be controlling law because the only other courts that have addressed this issue are district courts.

On December 9, 2004, Accenture/Andersen notified Plaintiff Moore that it had reversed its position on the disability leave policy and no longer intended to terminate him effective January 1, 2005. Accenture/Andersen has represented that it made this same decision with respect to the remaining class Plaintiffs; however, no action was taken by the court to ensure that the class plaintiffs were adequately protected. On December 21, 2004, Plaintiff Moore and the class plaintiffs filed and served a second complaint, case no. 1:04-cv-03717-TWT ("Moore II"). The purpose of the Moore II complaint was to seek the attorneys' fees for the

relief previously granted to the class. The second complaint should be considered an amended complaint, or, at a minimum, the second complaint related back to the first complaint as a renewal action, as all issues in Moore II were raised in Moore I. Contemporaneously with the filing of the Moore II complaint, the class plaintiffs filed a Motion for Attorneys' Fees. That motion was denied on May 6, 2005, and that case was erroneously dismissed for mootness and lack of standing. However, Moore I was voluntarily dismissed with respect to only Moore, rather than the entire class.

Out of an abundance of caution, on January 4, 2005, the class plaintiffs also filed a Special Motion for Fees and Costs and Motion for Limited Discovery with Brief in Support in the present action, Moore I. Judge Thomas W. Thrash issued an Order on September 16, 2005, denying Plaintiffs' Motion for Attorney Fees, Motion for Costs, and Motion for Discovery in Moore I. Unfortunately, Judge Thrash's ruling is clearly erroneous because the case has never been properly dismissed, and because Judge Thrash failed to address the fee issue pursuant to ERISA, which allows for fees even after a case has been dismissed. There is a split in the circuits as to how Judge Thrash should have exercised his discretion in reviewing the request for fees. However, Judge Thrash used no discretion at all because he refused to address the ERISA request for fees. In response to Judge Thrash's final Order, Plaintiffs filed a Notice of Appeal on September 27, 2005. The Eleventh Circuit panel reached its decision on February 10, 2006, affirming the erroneous decision by the district court without reaching a decision on the validity of the dismissal, or the judge's failure to address the ERISA fees standard.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. THE 2003 AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 23(E)(1) HAS CAUSED A SPLIT IN THE CIRCUITS REGARDING A COURT'S OBLIGATION TO NOTIFY POTENTIAL CLASS MEMBERS PRIOR TO THE DISMISSAL OF A CLASS ACTION COMPLAINT PARTICULARLY BECAUSE THE RIGHTS OF THE CLASS MAY BE ADVERSELY AFFECTED BY THE DISMISSAL.

After the amendment to Rule 23(e)(1), the only circuit to address the issue concerning notice to the class before a dismissal can be granted has been the Sixth. The District Court of Kansas in *Aikens v. Deluxe Fin. Servs., Inc.*, Civ. Action No. 01-2427-CM, 2005 WL 1041351 (D. Kan. March 2, 2005), and the Northern District of Illinois in *Daniels v. Bursey*, Case No. 03 C 1550, 2006 WL 468015 (N.D. Ill. October 19, 2004), have held that notice to the class prior to dismissal is only required after the class is certified. However, the Court of Appeals for the Sixth Circuit has held, "[e]ven the circuits that have not required notice to only putative class members as a general rule have warned that failure to provide notice is justified only in instances free of prejudice and collusion." *Doe v. Lexington-Fayette County Gov't*, 407 F.3d 755, 761 (6th Cir. 2005), The court went on to say:

> Most requests for voluntary dismissals . . . are made before there has been any class ruling. Whether a voluntary dismissal in these circumstances is sought in connection with a proposed settlement of claims of the individual plaintiff only or in the non-settlement context, most courts have stressed the need under Rule 23(e) to examine whether any prejudice to the class will

> result if the dismissal of the action is allowed without class notice. *Id.*

In other words, the Sixth Circuit has held that the court at a minimum must analyze the specific class action and determine whether notice is required, even if the class has not been certified. *Lexington-Fayette* at 762. The Court went on to say "[i]f, upon examination, the district court should find that the putative class members are likely to be prejudiced on account of a settlement or dismissal, the district court should provide Rule 23(e)(1) notice." *Id.* The Sixth Circuit specifically stated that "the context in which 'class' is used in Rule 23(e)(1) indicates that it is not limited to a certified class." *Lexington-Fayette* at 761, This ruling was after the 2003 amendment to Rule 23(e)(1) and is the only published circuit court ruling on the matter.

Moreover, the committee notes to the 2003 amendment clearly state that "[n]otice of a settlement binding on the class is required either when the settlement follows class certification *or when the decisions on certification and settlement proceed simultaneously.*" Fed. R. Civ. P. 23 (Committee Note, 2003 Amendments) (emphasis added). In the case at bar, Plaintiff Moore at all times was negotiating with Accenture/Andersen to obtain relief on behalf of himself and others similarly situated while the class certification process was being pursued. In fact, the dismissal was necessary because the certification motion was due on or about January 25, 2005. Fed. R. Civ. P. 23. The committee notes continue to state that, "[r]easonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action – such as filing claims. . . ." Fed. R. Civ. P. 23 (Committee

Note, 2003 Amendments). This is why it is important to identify whether the relief was granted to the entire class. In other words, by dismissing the entire class, the court was effectively restarting the statute of limitations which had previously been tolled by the action. The court owed the absent class members notice so that they could protect their interests and file separate claims, or alternatively, file motions to intervene as class representatives. It was, therefore, incumbent on the court to investigate whether notice of the dismissal was given to the other potential class members.

This argument is not to imply anything other than to stand for the proposition that the trial court should have taken time to examine the potential effect the voluntary dismissal would have on the class. By not doing so, the court failed to protect the procedural due process rights of the class members.

II. THE COURT ERRED IN DENYING THE PLAINTIFFS' ATTORNEYS' FEES BECAUSE THE RELIEF WAS GRANTED PRIOR TO THE DISMISSAL.

Even assuming that the Complaint was properly dismissed on December 8, 2004, the relief was clearly granted prior to that day. Plaintiff Moore attempted to dismiss the class Complaint on December 8, 2004. The following day, Plaintiff Moore's counsel was notified that the relief sought had been granted. In Moore II, the district court based its decision on the ground that the relief was subsequent to the dismissal of Moore I. Yet, the decision to grant the relief by Accenture/Andersen was clearly made prior to Plaintiff Moore's attempted and unallowable dismissal of the class. Whether Plaintiff

Moore knew that the relief had been granted at the time of his attempt to dismiss is irrelevant. In fact, the dismissal did not state that it was being dismissed by the class. It simply stated: "COMES NOW, V. Steven Moore, Plaintiff in the above-styled action, by and through counsel and hereby moves pursuant to Federal Rule of Civil Procedure 41(a)(1), to voluntarily dismiss without prejudice the above-styled action." Even though the voluntary dismissal was under Rule 41(a)(1), Plaintiff Moore moved the court to intervene; he was not taking and could not take unilateral action that was binding the class. The appropriate analysis should, therefore, recognize that the voluntary dismissal included a motion, and it was wrong for the clerk of court to take action on a motion without providing the requisite notice to the class members.

Furthermore, the court did not make a determination that the relief was in fact provided to the other class members. This is of the upmost importance given the statute of limitations to bring this action was on the verge of expiring, and especially given that the class did not dismiss its claims. Moreover, it is not realistic to conclude that a company the size of Accenture/Andersen made the decision to rehire an entire class of employees, then notified the employees on the same day. Clearly, the decision was made prior to the time it was conveyed to Plaintiff Moore. At the very least, this is a discoverable matter upon remand. Therefore, the district court erred by holding that the Moore I complaint was dismissed prior to the relief being granted.

If a class is able to obtain substantial relief, then they are entitled to their attorneys' fees. *See Williams v. City of Fairburn*, 702 F.2d 973 (11th Cir. 1983); *Watkins v. Mobile Housing Board*, 32 F.2d 565 (5th Cir. 1980); *Iranian*

Student's Association v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979). "There is no doubt that [plaintiff], as a prevailing party is entitled to attorney's fees." *Williams*, at 975.

In this case, Plaintiff Moore, and allegedly the entire class, obtained all of the relief sought, except the fees. Therefore, the class is entitled to an award of fees. Accenture/Andersen does not dispute that the relief was granted to the entire class. In fact, it is their argument in this action. The entire class was being terminated from employment, which would have eliminated their right to employee health and other benefits. After this suit was filed, Accenture/Andersen alleges that the class was reinstated and employee health and other benefits were continued. This is the exact type of relief that warrants an award of attorneys' fees in a class action suit. The Eleventh Circuit has held that when a class is able to obtain the relief that it seeks, then the class has prevailed for attorneys' fees purposes. *Fields v. City of Tarpon Springs, Florida*, 721 F.2d 318, 319 (11th Cir. 1983) ("The District Court nonetheless found that the lawsuit had been the catalyst for relief and found that the plaintiffs/appellees had prevailed. . . .").

The case law is clear that a prevailing party in a class action is entitled to an award of attorneys' fees. There is no dispute between Plaintiff Moore that the class in Moore I and Moore II received all, of the relief sought, except for attorneys' fees. The court was under a duty to provide notice to the rest of the class. The attempted voluntary dismissal has no effect on the matter. "[I]t is not inconsistent to find a party that voluntarily dismisses its action has nonetheless prevailed." *Fields*, at 321.

III. THE PREVAILING PARTY IN AN ERISA CASE IS ENTITLED TO THE GRANTING OF ATTORNEYS' FEES EVEN IF THIS COURT HOLDS THAT RULE 23(E)(1) DID NOT REQUIRE THE DISTRICT COURT TO GIVE NOTICE TO THE CLASS PRIOR TO DISMISSAL. THERE IS CURRENTLY A SPLIT IN THE CIRCUITS IN WHICH THE EIGHTH CIRCUIT MANDATES THAT THE PREVAILING PARTY IN AN ERISA CASE IS ENTITLED TO ATTORNEYS' FEES, WHILE THE REMAINING CIRCUITS HOLD THAT THE AWARD OF ATTORNEYS' FEES TO THE PREVAILING PARTY IS SUBJECT TO A DISCRETIONARY ANALYSIS.

The district court erred in this matter by refusing to conduct any analysis on whether attorneys' fees were appropriate pursuant to ERISA. 29 U.S.C. § 1132(g)(1) provides "In any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The Eleventh Circuit, the circuit in which this action was brought, requires the court to conduct an analysis to determine if attorney's fees in an ERISA case are appropriate. However, the Eighth Circuit has held that "[t]his section should be read broadly to mean that a plan participant or beneficiary if he prevails in his suit under § 1132 to enforce his rights under his plan, should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980); citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed. 2d 1263 (1968). If following the rule in the Eighth Circuit, no analysis was

necessary, and, as the prevailing party, Plaintiff Moore is thus entitled to attorneys' fees.

The remaining circuits have held that the prevailing party is entitled to fees only after an analysis is completed. The decision to award fees is then within the discretion of the district court. "A district court considering a motion for attorney's fees under ERISA should apply its discretion consistent with the purposes of ERISA, those purposes being to protect employee rights and to secure effective access to federal courts." *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984). However, in this case, no analysis was conducted by the district court, therefore, the case should at a minimum be remanded back to the district court for a determination on attorneys' fees under the applicable ERISA analysis.

In order to establish entitlement to a fee award under ERISA, the plaintiff must show that "[he] succeeded on any significant issue in litigation which achieves some benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40, 50 (1983). Because the class plaintiffs' actions induced Accenture/Andersen to reverse their position, at least as to Plaintiff Moore and allegedly for the entire class, and provided substantial equitable relief by not instituting the discriminatory amendments to its disability leave policy, Plaintiff Moore and the class succeeded on significant issues in litigation that achieved the substantial benefit sought. If the relief was granted to the entire class, it is irrelevant if the class plaintiffs met these ends prior to the adjudication of their suit. Their claim to fees is not weakened. *See Dunn v. The Florida Bar*, 889 F.2d 1010, 1013 (11th Cir. 1989), *citing Iranian Students Association v. Sawyer*, 639 F.2d 1160, 1163 (5th Cir. 1981);

"A party may prevail and be entitled to attorney's fees when remedial action by the Defendant effectively moots the controversy subsequent to the filing of the lawsuit" *Id.* at 1163.

Courts consider the following factors when determining whether to award attorneys' fees under ERISA:

> (1) the degree of opposing parties culpability of bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of attorneys' fees against opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan; and (5) the relative merits of the parties' positions.

See Hummell v. S.E. Rycoff & Co., 634 F.2d 446 (9th Cir, 1980). These factors weigh in favor of a fee award for Plaintiff Moore and the class under ERISA.

The following will analyze the instant case under the *Hummell* rule: First, there is bad faith, as evidenced by Accenture/Andersen's refusal to negotiate even with the named plaintiff; inability to articulate a reason for the firing of the entire class, other than corporate greed; and their illegal employment action aimed at the weakest members of society, the aged and disabled. Moreover, Accenture/Andersen has a previous history of malfeasance and greed, as evidenced by their failure to acknowledge the conflict of interest that brought down both Enron and its parent company, Arthur Andersen, LLP, in the Enron scandal. Moreover, the speed with which Accenture/Andersen reversed its position upon learning of the class action lawsuit suggests that Accenture/Andersen itself was aware that its conduct was unlawful. For the class plaintiffs, the

change in policy would have meant termination of employment and no longer having access to group coverage for health, dental, and life insurance. As disabled persons seeking health insurance the class plaintiffs would have had to pay extraordinary costs for coverage, if they would qualify with their pre-existing conditions, which is unlikely. This harsh result for the class plaintiffs, coupled with the lack of a business purpose for the policy, further indicate the bad faith of Accenture/Andersen.

The second factor is the opposing party's ability to pay if relief was in fact provided to the entire class. Accenture/Andersen has the ability to pay the fees requested, which amount to thirty percent of the value of the remedial action for the class Plaintiffs. Accenture/Andersen is a huge international corporation with thousands of employees which recently won a ten billion dollar contract with the Department of Homeland Security to upgrade the tracking systems for immigrants in the U.S. Ability is not an issue and earnings arc a matter of public record. The company is publicly traded and its finances are a matter of public record.

The third factor under Hummell is deterrence. A fee award in this matter would assist in deterring like conduct from others in the industry. A fee award sends the message that discrimination will not be tolerated and that ERISA plans must treat their beneficiaries according to the letter of the law. Further, because the policy reversal was Accenture/Andersen's response to a potentially damaging class action lawsuit and not the product of a structured settlement agreement, there is nothing to bind. Accenture/Andersen to its policy decision. A fee award would serve not only to deter other companies, but also to deter Accenture/Andersen from re-instituting the discriminatory policies

next week or next year, and would bind Accenture/Andersen as required under Rule 23(e)(1).

The fourth factor in determining a fee award under Hummell is whether the plaintiff sought to benefit all participants and beneficiaries. Plaintiff Moore has sought to act for the benefit of all others similarly-situated, and the merit of his position is supported by the unwillingness of Accenture/Andersen to litigate this matter to conclusion, and their granting of relief to the entire class. Plaintiff Moore, in his complaint, noted that he intended to seek class certification in this matter. Although a class had not yet been certified by the Court, Plaintiff Moore had begun the extensive process of obtaining class certification and had conveyed his intentions to Accenture/Andersen. Plaintiff Moore's attempted dismissal was filed in order to gain time to properly represent the class.

Finally, the fifth factor under Hummell examines the merits of the plaintiff's position. Plaintiff Moore's position was clearly meritorious as evidenced by the swift reversal in posture by Accenture/Andersen. Had Accenture/Andersen truly believed its actions were lawful, it would have had no problem pressing forward with the litigation. Clearly, concern over losing a class action lawsuit on this issue persuaded Accenture/Andersen to institute substantial equitable relief for Plaintiff Moore and allegedly for the entire class.

Here, Plaintiff Moore's actions induced Accenture/Andersen to provide substantial equitable relief to the entire class by not instituting the scheduled change to Accenture's Leave Without Pay policy on December 31, 2004. As a result, Plaintiff Moore succeeded on a significant issue in the instant litigation, i.e., Defendants agreed

to permit Plaintiff Moore to continue participating in the Plans and to continue receiving benefits from the Plans. Accenture/Andersen does not dispute that this relief was also granted to the entire class, which establishes the right to recover for fees pursuant to Rule 23(e)(1), based upon relief obtained on behalf of a class.

CONCLUSION

This petition should be granted because the district court allowed the court clerk to dismiss the action on behalf of the class when clearly the court had additional duties to perform before the dismissal should have been allowed. At a bare minimum, this case created a split in the circuits on how a Rule 23 voluntary dismissal should be handled, which needs to be resolved here. Moreover, the relief was granted before the dismissal, thus entitling the class to fees. Finally, there is a split in the circuits on how the trial court should have exercised its discretion in analyzing the case for a fee award under ERISA.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-15375
Non-Argument Calendar

D.C. Docket No. 04-03116-CV-TWT-1

V. STEPHEN MOORE, individually and
on behalf of all others similarly situated,

Plaintiff-Appellant,

versus

ACCENTURE, LLP,
ACCENTURE UNITED STATES GROUP MEDICAL PLAN,
ACCENTURES UNITED STATES GROUP DENTAL PLAN,
ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL
DEATH & DISMEMBERMENT INSURANCE PLAN,
ACCENTURE UNITED STATES OPTIONAL LIFE
INSURANCE PLAN,
ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL
DEATH & DISMEMBERMENT INSURANCE PLAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(February 10, 2006)

Before CARNES, PRYOR and HILL, Circuit Judges.

PER CURIAM:

V. Stephen Moore filed his original complaint seeking relief from defendants' new leave policy on October 25, 2004. He styled it as a class action, but never moved for nor was it ever certified as such. Nor was the original complaint ever served on any of the defendants.

On December 8, 2004, Moore filed a Notice of Voluntary Dismissal pursuant to Fed. R. Civ. P. 41(1)(a)(i). According to Moore's Initial Brief on appeal, he sought voluntary dismissal "in order to gain time to more properly represent the class through negotiated settlement rather than litigation."

On December 9, 2004, Moore states that he was notified by the defendants that they had changed their leave policy. Subsequently, he filed a motion seeking attorneys' fees, costs and for discovery in the dismissed case, arguing that he was a prevailing party. The district court denied the motion, holding that Moore had voluntarily dismissed the action before he obtained any relief for himself or the putative class.

Our review of the briefs and the record support the conclusion of the district court, and finding no reversible error, the denial of the motion is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

V. STEPHEN MOORE, Individually and On behalf of all others similarly situated, Plaintiffs, v. ACCENTURE, L.L.P., ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, ACCENTURE UNITED STATES OPTIONAL LIFE INSURANCE PLAN and ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, Defendants.	CIVIL ACTION FILE NO. 1:04-cv-3116-TWT COMPLAINT – CLASS ACTION JURY TRIAL DEMANDED

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

(Filed Dec. 8, 2004)

COMES NOW, V. Steven Moore, Plaintiff in the above-styled action, by and through counsel and hereby move pursuant to Federal Rule of Civil Procedure 41(a), to voluntarily dismiss without prejudice the above-styled action.

Respectfully submitted, this 7th day of December, 2004.

MELVILLE JOHNSON, P.C.

/s/ Christopher D. Vaughn
Christopher D. Vaughn
Georgia Bar No. 726226

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

V. STEPHEN MOORE, Individually and On behalf of all others similarly situated, Plaintiffs, v. ACCENTURE, L.L.P., ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, ACCENTURE UNITED STATES OPTIONAL LIFE INSURANCE PLAN and ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, Defendants.	CIVIL ACTION FILE NO. 1:04-cv-3116-TWT COMPLAINT – CLASS ACTION JURY TRIAL DEMANDED

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

(Filed Dec. 8, 2004)

COMES NOW, V. Steven Moore, Plaintiff in the above-styled action, by and through counsel and hereby move pursuant to Federal Rule of Civil Procedure 41(a), to voluntarily dismiss without prejudice the above-styled action.

Respectfully submitted, this 7th day of December, 2004.

MELVILLE JOHNSON, P.C.

/s/ Christopher D. Vaughn
Christopher D. Vaughn
Georgia Bar No. 726226

44 Broad Street, N.W.
Suite 222

Entered as dismissed pursuant to Rule 41(a)(l)(i)~~(ii)~~, F.R.C.P.

Luther D. Thomas, Clerk

By: /s/ [Illegible]
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

V. STEPHEN MOORE, individually and on behalf of all others similarly situated, Plaintiff, v. ACCENTURE, LLP, et al., Defendants.	CIVIL ACTION FILE NO. 1:04-CV-3116-TWT

ORDER

This is an ERISA action. It is before the Court on the Plaintiff's Motion for Attorney Fees, for Costs and for Discovery [Doc. 4]. The Plaintiff voluntarily dismissed this action before he obtained any substantive relief for himself or the class that he claimed to represent. An award of attorney fees is not appropriate. The Plaintiff's Motion for Attorney Fees, for Costs and for Discovery [Doc. 4] is DENIED.

SO ORDERED, this 16 day of September, 2005.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

(3)

No. 05-1450

Supreme Court, U.S.
FILED
JUL 14 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

V. STEPHEN MOORE,

Petitioner,

v.

ACCENTURE LLP, ACCENTURE UNITED STATES GROUP LIFE INSURANCE PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES GROUP DEPENDENT ACCIDENTAL DEATH AND DISMEMBERMENT PLAN, and ACCENTURE UNITED STATES GROUP DEPENDENT LIFE INSURANCE PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Accenture, LLP, whose correct name is Accenture LLP, is an Illinois Limited Liability Partnership, not a corporation.

Respondents Accenture United States Basic Life/ Accidental Death & Dismemberment Insurance Plan, whose correct name is Accenture United States Group Life Insurance Plan, Accenture United States Group Dental Plan, Accenture United States Group Medical Plan, Accenture United States Optional Accidental Death & Dismemberment Insurance Plan, whose correct name is Accenture United States Group Dependant Accidental Death and Dismemberment Insurance Plan, and Accenture United States Optional Life Insurance Plan, whose correct name is, Accenture United States Group Dependant Life Insurance Plan, are employer sponsored employee welfare benefit plans. None of these respondents are corporations.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Counter-Statement of the Case	1
Reasons for Denying the Petition	6
I. There is no Conflict Between the Decision of the Eleventh Circuit and the Sixth Circuit Decision to Which Moore Cites Warranting *Certiorari* in this Case	8
II. The Eleventh Circuit's Decision is not in Conflict with Decisions of the Eighth Circuit Regarding the Entitlement of Prevailing Plaintiffs to Attorneys' fees in ERISA Actions	12
III. Moore's Remaining Arguments Also Do Not Warrant the Granting of the Writ He Seeks	13
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324 (11th Cir. 2004) 11

Aikens v. Deluxe Fin. Servs., Inc., Civ. Action No. 01-2427-CM, 2005 U.S. Dist. LEXIS 8079 (D. Kan. March 2, 2005) 9, 10, 11

Daniels v. Bursey, Case No. 03 C 1550, 2004 U.S. Dist. LEXIS 20950 (N.D. Ill. Oct. 19, 2004) ...9, 10, 11

Depree v. Thomas, 946 F.2d 784 (11th Cir. 1991) 11

Doe v. Lexington-Fayette Urban County Government, 407 F.3d 755 (6th Cir. 2005) 8, 9, 10, 11

Hall v. Coram Healthcare Corp., 157 F.3d 1286 (11th Cir. 1998) 11

Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980), *overruled by Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966 (8th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003) 12, 13

Martin v. Arkansas Blue Cross & Blue Shield, 299 F.3d 966 (8th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003) 7, 12, 13

Walker v. Jones, 10 F.3d 1569 (11th Cir. 1994) 11

Cited Authorities

Page

Statutes:

29 U.S.C. § 1001 *et seq.* 2, 7

29 U.S.C. § 1132(a)(1)(B) 2

29 U.S.C. § 1140 2

Rules:

Fed. R. Civ. P. 4(d) 2

Fed. R. Civ. P. 23(e) 6, 8, 9, 10, 11

Fed. R. Civ. P. 41(a) 13

Sup. Ct. R. 10 ..... 6, 13

Sup. Ct. R. 10(a)-(c) 6

Other Authorities:

Fed. R. Civ. P. 23 advisory committee note 9

COUNTER-STATEMENT OF THE CASE[1]

In late 2002, Accenture announced to its employees that it was changing its leave of absence policy and the related provisions of its various benefit plans to clarify, and in some cases limit, the length of time employees would be allowed to remain employed in a leave of absence status. R. 1-1-5, 6. Under the new policy, employees who had fewer than ten years of service when they began a leave of absence would be limited to three years of leave, after which, they would be required to return to work or to terminate their employment. R. 1-4-Ex. 2. For those employees who were already on leave at the time of the announcement, Accenture agreed to delay the effective date of the new policy so that none of them would be terminated before January 1, 2005, regardless of the length of time they had already been on leave. R. 1-4-Ex. 2. Thus, these employees were effectively grandfathered under the old system for an additional two years.

Petitioner V. Stephen Moore began working for Accenture in 1987 and commenced a disability leave of absence in 1992, after approximately five years of active service. R. 1-1-8, 9. He was still employed in a disability leave of absence status in 2002, when the new policy was announced. R. 1-1-9. Under the new policy, Moore would have been ineligible to remain on leave beyond December 31, 2004. R. 1-1-9. Thus, his employment would have terminated effective January 1, 2005, unless he had returned to work by that date. R. 1-1-9.

---

1. Respondents submit this Counter-Statement of the Case because Petitioner's Statement of the Case omits and/or mischaracterizes important record evidence which underlies the Eleventh Circuit's holding and also misstates the history of the proceedings below in several important respects.

On October 25, 2004, Moore filed his putative class action Complaint in this case, challenging the new policy, which would have terminated his employment and ended his right to participate in various of Accenture's employee benefit plans. The Complaint asserted claims pursuant to the Employee Retirement Income Security Act, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"); specifically, 29 U.S.C. § 1140 and 29 U.S.C. § 1132(a)(1)(B). R1-1-10. The action named as defendants, Accenture and each of the benefit plans in which Moore's participation would have ceased as a result of the new policy. R. 1-2-4. Moore provided a courtesy copy of the Complaint to Accenture's attorneys, but never formally served the Complaint and never requested a waiver of service pursuant to Fed. R. Civ. P. 4(d). R. 1-7-2.

At about the same time Moore filed his original ERISA lawsuit, he also filed two charges of discrimination with the Equal Employment Opportunity Commission, alleging that the same decision constituted discrimination on the bases of disability and age, respectively. R. 1-4-4. Both charges were referred to the EEOC's alternative dispute resolution system for mediation. R. 1-4-4. However, no mediation was ever conducted as to either charge, and the EEOC ultimately issued no-cause determinations on both charges.

On December 8, 2004, shortly after the parties initially agreed to mediate the discrimination charges, Moore voluntarily dismissed the ERISA lawsuit, in what he characterized in his briefs on appeal as a "show of good faith."[2] R. 1-4-4. The dismissal was accomplished by the

2. By his own admission, Moore dismissed his lawsuit because of the planned mediation of his individual dispute before the EEOC. Although Moore's Special Motion is artfully pled to imply the (Cont'd)

filing of a Notice of Voluntary Dismissal, dated December 7, 2004, and stating: "COMES NOW, V. Steven Moore, Plaintiff in the above-styled action, by and through counsel and hereby move pursuant to Federal Rule of Civil Procedure 41(a) to *voluntarily dismiss* without prejudice the above-styled action." Pet. App. 3-4 (emphasis added). The dismissal was entered by the Clerk of Court, "pursuant to Rule 41(a)(1)(i)~~(ii)~~, F.R.C.P." Pet. App. 5-6 (strike-out in original).

On December 9, 2004, Accenture began notifying the temporarily grandfathered employees that it had decided not to apply the new policy to them after all. R. 1-7-2. Thus, Accenture's counsel wrote to Moore's counsel to advise that Moore and the other temporarily grandfathered employees were being exempted from the new policy and would not be terminated on January 1, 2005. R. 1-4-4-5; R. 1-4-Ex. 4.

On January 4, 2005, nearly a month after the dismissal and termination of the case, Moore filed the "Special Motion" that is the subject of this appeal, seeking an award of fees and costs against the Defendants and an opportunity to conduct limited discovery. As Moore described his proposed discovery, its purpose would have been to ascertain the value of the benefit realized by the putative class as a result of Accenture's decision not to apply the new rule to them. R. 1-4-10. Moore argued that his attorney was entitled to enforce the contingency fee agreement between himself and Moore against the entire putative class, and that Defendants should

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(Cont'd)

existence of a deal under which Accenture agreed to mediate in exchange for his agreement to dismiss the federal lawsuit, no such "deal" is actually alleged and none existed. In fact, Moore made the decision to dismiss without first consulting or even advising Defendants or their counsel.

be responsible for paying him an amount equal to that sum.[3] R. 1-4-9-10.

On September 20, 2005, the District Court denied Moore's Special Motion for Attorneys' Fees in this action. In its Order, the District Court held that "[t]he Plaintiff voluntarily dismissed this action before he obtained any substantive relief for himself or the class that he claimed to represent, [thus] [a]n award of attorney fees is not appropriate."[4] R. 1-10-1. In the same order, the

3. Before filing the "Special Motion" in this case, Moore filed a second putative class action Complaint ("Moore II") based on the same causes of action raised in the original Complaint, but expressly acknowledging that "the underlying issues in this matter have all been resolved by Defendant . . . ," and that he and all the putative class members he purported to represent have already received the relief sought in the Complaint. In fact, in the second Complaint, Moore expressly acknowledged that he had filed his second lawsuit solely for the purpose of seeking an award of fees as a "prevailing party" in the first, voluntarily dismissed lawsuit. Along with his second Complaint, Moore also filed and served a Motion for Fees and Costs. On May 6, 2005, the District Court granted the Defendants' motion to dismiss Moore II and denied Moore's motion for attorneys' fees. Moore did not appeal either of those decisions and his time in which to appeal those decisions has long since passed.

4. At several points in his Petition, Moore suggests that the district court once granted attorneys' fees to him or to the putative class. For example on page ii of the section entitled Questions Presented, Moore states: "The purpose of the Moore II complaint was to seek the attorneys' fees previously granted to the class, as admitted by Accenture/Andersen." Pet. at ii. Likewise, in his second numbered question, Moore asks, "Whether the class plaintiffs are entitled to the prior attorneys' fee award, notwithstanding the district court's subsequent dismissal." Pet. at iv. In fact, however, the District Court never awarded Moore or his putative class any attorneys' fees.

District Court also denied Moore's request for discovery. R. 1-10-1.

Moore timely appealed the District Court's September 20, 2005 Order to the Eleventh Circuit. On appeal, Moore conceded that the original controversy between the parties had been resolved by Accenture's decision to grandfather Moore and the putative class members and that attorneys' fees and costs were the only remaining issues in the case. In addition to reprising his arguments below, however, Moore argued for the first time on appeal that the District Court erred by allowing the dismissal of the case without first issuing notice to the putative class members.

In its decision, the Court of Appeals did not address Moore's argument that the District Court's dismissal was invalid because of the failure to give notice to the putative class. Pet. App. 1-2. Instead, the Court of Appeals simply noted that Moore admitted dismissing the case "in order to gain time to more properly represent the class through negotiated settlement rather than litigation." Pet. App. 2. The court then noted that it was not until the day after he filed his notice of voluntary dismissal that the plaintiff even learned that the relief he had been seeking in the lawsuit had been granted voluntarily by the defendants. Pet. App. 2. The Court of Appeals acknowledged the District Court's holding that Moore was not entitled to an award of attorneys' fees and costs because he had voluntarily dismissed the case "before he obtained any relief for himself or the putative class." Pet. App. 2. The Court of Appeals then stated that, finding no error in this holding, it was affirming the decision of the District Court. Pet. App. 2.

REASONS FOR DENYING THE PETITION

Moore has offered no "compelling reasons" why his Petition for a Writ of *Certiorari* should be granted. *See* Sup. Ct. R. 10. Despite his claims, Moore cannot demonstrate that the Eleventh Circuit's February 10, 2006 decision in this case conflicts with the decisions of this Court or of any other Court of Appeals or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Indeed, the Petition arises out of an unremarkable case in which the United States Court of Appeals for the Eleventh Circuit affirmed a District Court's decision to deny Moore's "special motion" for attorneys' fees and costs because he had already voluntarily dismissed the case before obtaining any relief for himself or his putative class.

Moore argues that the Eleventh Circuit's decision is in conflict with a decision of the Sixth Circuit, purportedly holding that the language of Rule 23(e) of the Federal Rules of Civil Procedure requires district courts to give notice to putative class members before permitting the dismissal of any case nominally brought as a class action, regardless of whether a class has been certified. However, Moore's characterization of the Sixth Circuit's holding is simply wrong. Moreover, the Eleventh Circuit did not even address the issue of notice to the putative class in its decision. Although Moore apparently believes that the Eleventh Circuit necessarily implicitly rejected the purported holding of the Sixth Circuit because it ignored his argument that the voluntary dismissal should not have been entered without notice to the putative class, he fails to note that he never raised this argument in the District Court. Thus, it is equally likely that the Eleventh Circuit simply concluded that Moore

had waived the argument. Finally, even if the Eleventh Circuit's decision arguably conflicts with that of the Sixth Circuit, Moore's case is an inappropriate vehicle for resolving that conflict because of Moore's failure to preserve the notice issue by raising it in the District Court.

Second, Moore suggests that there is a conflict between the approaches employed by the Eleventh and the Eighth Circuits to determine whether attorneys' fees should be awarded to prevailing parties in actions brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Specifically, Moore argues that the Eighth Circuit mandates the award of attorneys' fees to prevailing parties, whereas the Eleventh Circuit applies a five-factor test to determine whether fees should be awarded. In fact, however, the Eighth Circuit decision to which Moore cites was expressly overruled almost four years ago, in favor of an approach that the *en banc* court noted was in line with the "overwhelming majority of circuits [including the Eleventh Circuit] that have considered the question." *Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 971-72 (8th Cir. 2002) (*en banc*), *cert. denied*, 537 U.S. 1159 (2003).

Moore's remaining arguments all focus on alleged errors of law and fact by the Courts below, none of which would warrant the granting of a writ of *certiorari* in this case. For example, Moore suggests that the Courts below should have concluded that Respondents' decision to grant relief to the class preceded Moore's filing of the Notice of Voluntary Dismissal, even if Moore was unaware of the decision when he filed the Notice. Likewise, Moore argues that the Courts below should have construed his Notice of Dismissal as a dismissal only as to Moore himself and not as to the class, or that it should have construed the notice as a motion

requesting the District Court's intervention. Finally, Moore suggests that it was error for the Courts below to allow the dismissal without first determining whether relief had in fact been afforded to the entire class as both sides seemed to agree in their pleadings. None of these disputes rises to a level warranting this Court's grant of a writ of *certiorari*.

I. There is no Conflict Between the Decision of the Eleventh Circuit and the Sixth Circuit Decision to Which Moore Cites Warranting *Certiorari* in this Case

In his Petition Moore suggests that the Eleventh Circuit's decision in his case is in conflict with the Sixth Circuit's decision in *Doe v. Lexington-Fayette Urban County Government*, 407 F.3d 755 (6th Cir. 2005). In particular, Moore argues that the two decisions reach different conclusions about whether the language of Rule 23(e) of the Federal Rules of Civil Procedure, as amended in December 2003, requires district courts to give notice to a putative class before granting a request for voluntary dismissal. Moore claims that the *Doe* court held that notice is required even under the newly amended language of the rule, whereas, the Eleventh Circuit and at least two district courts have taken the opposite view.

Prior to the December 1, 2003 amendment, Rule 23(e) provided that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs." In contrast, the amended rule provides that: "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Fed. R. Civ. P. 23(e).

By its plain language, the amended Rule 23(e) requires judicial approval of a dismissal only after a class has been certified. In fact, Rule 23(e) was amended in 2003 to make clear that court approval is required for voluntary dismissal and settlement only as to *certified* classes. *Aikens v. Deluxe Fin. Servs., Inc.*, Civ. Action No. 01-2427-CM, 2005 U.S. Dist. LEXIS 8079, at * 13-15 (D. Kan. March 2, 2005) ("The plain language of Rule 23 indicates that the court has no duty or jurisdiction to approve [a voluntary dismissal] in a case where a class is not certified."); *Daniels v. Bursey*, Case No. 03 C 1550, 2004 U.S. Dist. LEXIS 20950, at * 18-19 (N.D. Ill. Oct. 19, 2004) (discounting plaintiff's argument that Rule 23(e) required court intervention in a settlement of a class action in which the class was not certified based on the plain language of the rule resulting from the 2003 amendment). The advisory committee notes accompanying the proposed amendment further reinforce this interpretation:

> Rule 23(e)(1)(A) resolves the ambiguity in the former Rule 23(e)'s reference to dismissal or compromise of a "class action." That language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims. . . . The new rule requires approval only if the claims, issues, or defenses of a *certified* class are resolved by settlement, voluntary dismissal, or compromise.

Fed. R. Civ. P. 23 advisory committee's note (emphasis added).

Moore argues that the *Doe* case, which he notes was decided after the effective date of the amendment, holds that notice to the uncertified putative class is still required before

a dismissal, even under the amended Rule 23(e), and that *Doe* is therefore in conflict with the Eleventh Circuit's decision in his case. However, Moore is wrong for at least three reasons.

First, although *Doe* was decided after the effective date of the amendments to Rule 23(e), the dismissals at issue in *Doe* occurred before the effective date of the amendment. Moreover, the Sixth Circuit's decision in *Doe* makes clear that it evaluated the propriety of the dismissals under the pre-amendment language of the Rule:

> Rule 23(e) of the Federal Rules of Civil Procedure regulates the dismissal or settlement of class actions. That subsection, ***as it applies to the facts of this case in its formulation prior to amendment in December of 2003***, provided that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e) 2003.

407 F.3d at 761 (emphasis added). Thus, *Doe* is not even in conflict with the decisions in *Aikens* and *Daniels*.

Second, even if the *Doe* holding were interpreting the post-amendment version of Rule 23(e), and therefore was in conflict with *Aikens* and *Daniels*, the decision would not be in conflict with the Eleventh Circuit's decision in Moore's case because the Eleventh Circuit's decision says nothing about the need for notice to the putative class. The decision is silent on that point, a fact even Moore concedes. *See* Pet. at 6 ("The Eleventh Circuit panel reached its decision on

February 10, 2006 affirming the erroneous decision by the district court without reaching a decision on the validity of the dismissal . . .”). Moore apparently argues that the Eleventh Circuit's silence is an implicit endorsement of the *Aikens* and *Daniels* holdings.

However, Respondent's noted in their brief on appeal that Moore had never raised the notice issue in the District Court. *See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1328-30 (11th Cir. 2004) (dismissing appeal on the basis that “‘an issue not raised in the district court and raised for the first time in an appeal will not be considered by this Court.’”) (quoting *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994)); *Hall v. Coram Healthcare Corp.*, 157 F.3d 1286, 1290 (11th Cir. 1998); *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991). Thus, it is entirely plausible that the Eleventh Circuit rejected Moore's argument, not because it reached a conclusion that Rule 23(e) does not require notice, but rather, because it concluded that Moore had waived the argument. Of course, regardless of why the Eleventh Circuit remained mute on the question, Moore's case is still an inappropriate vehicle for resolving the purported conflict precisely because he did not preserve the notice argument by raising it in the District Court. Moore's failure to preserve the notice issue represents a third reason why the purported conflict between *Doe* and the decision of the Eleventh Circuit would not justify granting his Petition.

II. The Eleventh Circuit's Decision is not in Conflict with Decisions of the Eighth Circuit Regarding the Entitlement of Prevailing Plaintiffs to Attorneys' fees in ERISA Actions

Moore also argues that the Eleventh Circuit's decision conflicts with a decision of the Eighth Circuit in regard to the entitlement of prevailing plaintiffs to attorneys' fee awards in ERISA actions. Specifically, Moore argues that the Eighth Circuit's holding in *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980), *overruled by Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 971-72 (8th Cir. 2002) (*en banc*); *cert. denied*, 537 U.S. 1159 (2003), "mandates that the prevailing party in an ERISA case is entitled to attorneys' fees," and that decisions from the Eleventh Circuit instead require the courts to "conduct an analysis to determine if attorneys' fees in an ERISA case are appropriate." Pet. at 12. Moore's claim of a split in the circuits is simply wrong.

In fact, the Eighth Circuit, sitting *en banc*, expressly overruled the holding he cites from *Landro* almost four years ago. *Martin*, 299 F.3d at 271-72. After analyzing the arguments for and against the *Landro* court's presumption in favor of fee awards to prevailing ERISA plaintiffs, the *Martin* court stated:

> . . . we agree with the overwhelming majority of circuits that have considered the issue and concluded that the presumption should not be employed in ERISA cases. Although our circuit was the first to apply the presumption in ERISA fee-shifting cases, we now find that the use of

> several nonexclusive factors best facilitates the exercise of the court's discretion in ERISA cases. We overrule *Landro's* holding to the contrary.

299 F.3d at 971-72. Thus, even if the Eleventh Circuit's decision—which seems to rest on a finding that Moore was not a prevailing party at all and is silent on the standard to be applied in awarding fees—could be characterized as inconsistent with the holding in *Landro*, there is no *current* conflict between the circuits on this point.

III. Moore's Remaining Arguments Also Do Not Warrant the Granting of the Writ He Seeks

Moore's remaining arguments amount to little more than random assignments of error. However, the Courts own rules make clear that a writ of *certiorari* should only be granted based on "compelling reasons" and should rarely be granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Moore's quibbles with the findings of the Courts below are largely comprised of alleged erroneous factual findings. For example, he claims that the Courts below should have concluded that the relief was afforded to him and his putative class before the dismissal, or alternatively that the lower Courts should not have found on the evidence before them that the entire putative class was actually afforded relief. Finally, he argues that the Courts below misconstrued his self-titled "Notice of Voluntary Dismissal," filed "pursuant to Federal Rule of Civil Procedure 41(a)," as just that, rather than as a motion to dismiss, to be acted upon only after due consideration by the District Judge. Even putting to one side the question whether this issue is frivolous, it is clear that the issue is not one warranting the exercise of this Court's discretionary jurisdiction on writ of *certiorari*.

CONCLUSION

For the reasons stated, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 05-1450

In The Supreme Court of the United States

V. STEPHEN MOORE, and others similarly situated,

Petitioners,

vs.

ACCENTURE, LLP, ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, and ACCENTURE UNITED STATES OPTIONAL LIFE INSURANCE PLAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY TO RESPONDENTS' STATEMENT OF CASE	1
REASONS FOR GRANTING THE PETITION	2
CONCLUSION	4

TABLE OF AUTHORITIES

Page

FEDERAL CASES

UNITED STATES SUPREME COURT

Sibbach v. Wilson & Co., 312 U.S. 655, 61 S. Ct. 422 (1941) 4

UNITED STATES COURTS OF APPEAL

Doe v. Lexington-Fayette County Gov't, 407 F.3d 755 (6th Cir. 2005) 2

Hummell v. S.E. Rykoff & Co., 634 F.2d 446 (9th Cir. 1980) 2, 4, 5

FEDERAL RULES

S. Ct. Rule 24.1(a) 3, 4

OTHER SOURCES

5 Am. Jur. 2D § 767 (1995) 4

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

While Accenture, *et al.* states that Plaintiff Moore has mischaracterized the facts in his Statement of the Case, it is in fact Accenture, *et al.* that omits several key facts in its Counter-Statement of the Case. Plaintiff Moore did in fact file two Charges of Discrimination with the EEOC, however, only one of those was filed "at about the same time" as the putative class action at hand. Plaintiff Moore filed a Charge of Discrimination with the EEOC based upon disability discrimination on August 5, 2004. Plaintiff Moore also filed a Charge of Discrimination with the EEOC based upon age discrimination on October 18, 2004. Plaintiff Moore then filed the instant lawsuit on October 25, 2004. Importantly, Accenture, *et al.* fails to point out that both of the charges filed at the EEOC "were class action charges" on behalf of Plaintiff Moore and others similarly situated.

Accenture, *et al.* also correctly points out that the EEOC referred the Charge of Discrimination to the alternative dispute resolution system within the EEOC after Accenture, *et al.* agreed to mediate. Accenture, *et al.* is again correct in stating that there was no mediation, because, the mediation was cancelled after Accenture, *et al.* decided not to mediate despite initially agreeing to mediation.[1]

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[1] Accenture, *et al.* does correctly point out that there was no formal agreement between the parties that the complaint would be dismissed if Accenture, *et al.* agreed to mediate; however, no agreement was necessary because Accenture, *et al.* had already agreed to mediate. Moreover, Plaintiff Moore never stated or implied that such an agreement existed.

(Continued on following page)

REASONS FOR GRANTING THE PETITION

Accenture, *et al.'s* primary argument seems to be that Plaintiff Moore failed to raise the conflicts of law addressed in Plaintiff Moore's brief at the District Court. The conflicts of law relate to the notice requirements of a class action dismissal and the split in the circuits over the granting of attorneys' fees in an ERISA action.

Accenture, *et al.* argues that there is no split in the circuits as to the notice requirement required when dismissing a class action complaint. Accenture, *et al.* stated that the decision in *Doe v. Lexington-Fayette County Gov't*, 407 F.3d 755, 761 (6th Cir. 2005), made two years after the 2003 amendment, does not apply to this post amendment case. However, *Doe* is the only post 2003 amendment that address this issue and was in fact decided post-amendment. In the event that *Doe* does not apply to the post-amendment rule, then this is a case of first impression and this Court must make clear the notice requirements for parties to voluntarily dismiss putative class action complaints.

Accenture, *et al.* fails entirely to address Plaintiff Moores argument that the Court failed to properly analyze Plaintiff Moore's claim for attorneys' fees as a prevailing party in an ERISA action pursuant to *Hummell*. *Hummell v. S.E. Rycoff & Co.*, 634 F.2d 446 (9th Cir. 1980). Pursuant to *Hummell*, Courts consider the following factors when determining whether to award attorneys' fees under ERISA:

This is just another example of the Accenture, *et al.'s* bad faith throughout this entire process.

> (1) the degree of opposing parties' culpability of bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of attorneys' fees against opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan; and (5) the relative merits of the parties' positions. *Id.*

As outlined in the Petition for Certiorari, the factors clearly weigh in favor of a fee award for Plaintiff Moore and the class under ERISA. This Court must at a minimum remand this case to the District Court so that an analysis can be conducted to determine if an award of attorneys' fees is appropriate.

Accenture, *et al.* also relies heavily on an alleged failure of Plaintiff Moore to raise these issues at the District Court. However, based upon the improper dismissal of the complaint, Plaintiff Moore did not have an opportunity below to raise these issues. There was no motion to dismiss to respond to, nor a motion for summary judgment, which would have provided Plaintiff Moore the opportunity to raise these issues. Plaintiff Moore raised the issues at the earliest possible time, which was on appeal. Plaintiff Moore did not address the failure to notify the class of the dismissal in his motion for fees as that issue was not germane to that motion.

Furthermore, even assuming *arguendo* that Plaintiff Moore did fail to raise the arguments addressed above at the District Court when an issue on appeal is that of a plain error, then this Court may review regardless of whether it was raised in the courts below. Supreme Court Rule 24.1(a) states that "the Court may consider a plain

error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." S. Ct. Rule 24.1(a). Furthermore, "federal courts have recognized that in federal civil cases, the Courts of Appeals have the power to note plain errors on the record even though such errors were not raised or were not properly raised by the parties." 5 Am. Jur. 2D § 767 (1995).

The theory that plain error is reviewable by this Court even if not properly raised at the district court is consistent with the Court's holding in *Sibbach v. Wilson & Co.* 312 U.S. 655, 61 S. Ct. 422 (1941). In that case the issue decided was not even raised on appeal at the circuit court; however, this Court raised the issue because it was plain error. In the instant case, it was plain error for the court to dismiss the class action complaint without making a determination as to whether notice was required; it was also plain error for the court to deny Plaintiff Moore's motion for fees without analyzing the case pursuant to *Hummell*. When the error addressed is, as in this case, plain error, this Court has the power to review the matter even if it is not addressed in the courts below.

CONCLUSION

For the reasons addressed in the Petition for Certiorari and in this Reply, the petition should be granted because the district court allowed the court clerk to dismiss the action on behalf of the class when clearly the court had additional duties to perform before the dismissal should have been allowed. Moreover, the trial court failed

at a minimum to address the *Hummell* factors when denying Plaintiff Moore's motion for fees under ERISA.

Respectfully submitted,

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